No. 93-141

In The

Supreme Court of the United States

October Term, 1993

WEST LYNN CREAMERY, INC. and
LECOMTE'S DAIRY, INC.,

Petitioners,

v.

GREGORY WATSON, COMMISSIONER OF
MASSACHUSETTS DEPARTMENT OF
FOOD AND AGRICULTURE,

Respondent.

**On Writ Of Certiorari
To The Massachusetts Supreme Judicial Court**

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF AMICUS CURIAE

I. INTEREST OF THE AMICUS

In 1992, the Commissioner of the Massachusetts Department of Food and Agriculture ("the Commissioner") issued an Amended Pricing Order that requires Massachusetts milk dealers to pay monthly assessments of the fluid milk sold in-state during the previous month. The money is paid into the Massachusetts Dairy Equalization Fund and divided up and distributed among Massachusetts dairy farmers. Most of the milk on which the assessment is due comes from out-of-state farmers, yet only Massachusetts dairy farmers are entitled to share in the "equalization" fund.

The effects of the pricing order are not limited to Massachusetts, but, if permitted to stand, will directly depress the prices dealers pay to Vermont producers. The pricing order manipulates the wholesale cost of milk in Massachusetts, as well as in any other state that supplies milk to Massachusetts, to divert money that was formerly part of the price paid to out-of-state farmers for their milk to subsidize the Massachusetts dairy industry.

This regulation is pure economic protectionism that burdens interstate commerce by interfering with competition and favoring in-state interests at the expense of out-of-state milk producers. The public policy of federalism that binds this nation as an economic unit and prevents one state from prospering at the expense of its neighbor is abandoned under the pricing order. The state of Vermont, as Massachusetts' sister state, neighbor, milk supplier, and regional equal under the federal milk pricing legislation, is in a prime position to articulate both the

national and local public interest to be served by invalidating such a blatantly discriminatory regulation.

II. SUMMARY OF ARGUMENT

The Massachusetts pricing order violates the Commerce Clause by decreasing the income and competitiveness of Vermont farmers (and other out-of-state farmers who supply milk to Massachusetts dealers) while boosting the profits of Commonwealth producers. The Massachusetts law imposes a tax on all milk sold in the state, most of which comes from farmers in other states, and directs that the resulting revenues be paid only to Massachusetts producers. Vermont exports a great deal of milk to Massachusetts. Our farmers do not receive any of the subsidy money raised by their milk, nor are they free to reduce their milk prices to compete with the Massachusetts farmers because out-of-state milk is taxed in the same amount as in-state milk. This neutralizes competition while guaranteeing Massachusetts farmers a higher price for their milk as a result of the monthly subsidy. The assessment further burdens out-of-state farmers by increasing the cost of milk to dealers, and commensurately reducing those dealers' financial ability to negotiate and pay the premiums that have traditionally been the one area in milk pricing governed by competitive market forces.

III. STATEMENT OF THE CASE

The case is as stated by Petitioners.

IV. ARGUMENT

A. THE MASSACHUSETTS PRICING ORDER AND HOW IT WORKS

On a monthly basis, the federal government sets the minimum price that dairy farmers receive for their milk. The prices are set regionally, and Vermont and Massachusetts are in the same region and therefore bound by the same federal minimum. Under the federal pricing system, milk is priced in part depending upon its ultimate use. Class I milk is fluid milk, which commands the highest price. Ice cream, cheese, butter, dry milk powder, etc. fall in Classes II through III-A, and are priced lower. The monthly minimum price that farmers are paid for their milk is calculated as a blend of the four price classes.

The Massachusetts pricing order sets a new, higher Class I minimum price, and requires Class I dealers to pay, as an assessment, a percentage of the difference between the federal and state minimums into the equalization fund for the benefit of the Massachusetts farmers. Besides the obvious disparity in treatment that results because the in-state farmers are recipients of "equalization" funds that are denied their Vermont counterparts, the assessment hurts out-of-state farmers in two other ways. First, out-of-state milk is subject to the Massachusetts assessment, which drives up the mandatory minimum cost of their milk to Class I dealers. Out-of-state

farmers, who, unlike the in-state farmers, derive no advantage from the increase, are thus prevented from offering lower prices and competing with Massachusetts farmers for a larger share of the milk market. Second, the increased cost of the milk erodes the ability of fluid milk dealers to pay "over-order" premiums.

The over-order premium is the amount over the federal minimum price that a farmer is paid for his or her milk by dealers/processors of Class I fluid milk. The premiums are paid on fluid milk only, and are calculated using the Class I minimum price, rather than the lower blend price, as a base. Negotiated between individual farmer and dealer, the premiums provide the sole competitive, "free-market" opportunity to make a profit in the highly-regulated milk business, as well as the economic incentive for farmers to produce superior quality milk to sell to Class I dealers.

By forcing up the cost of the fluid milk to the dealer selling in Massachusetts, the Commissioner is conversely reducing the amount the dealer may be willing to pay to the farmer for Class I milk. For example, if a dealer is required to pay $13.00 per hundred pounds (CWT) of fluid milk under the federal pricing order and is now required to pay an additional $1.00 on that same CWT to the Commonwealth on behalf of the Massachusetts farmers, the base price has increased by $1.00 for every CWT purchased. Increasing the cost of milk reduces the amount the dealer formerly had available to pay in over-order premiums. If a dealer had been paying $.75 over-order to a farmer for Class I milk, for a total price of $13.75/CWT, and he or she is now required to pay $14.00 for the milk before even considering a premium, the over-

order premiums will be reduced to accommodate the cost increase caused by the assessment. Given the federally mandated minimum prices, and the enduring stability of consumer milk prices, the only area of flexibility to accommodate the cost increase is the over-order premium.

The Massachusetts farmer is insulated from the effects of a dealer's inability to pay over-order premiums at the pre-assessment rate by being the designated recipient of the assessment funds. The out-of-state farmer simply makes less on every CWT he sells. While theoretically the dealer is free to pay the assessment and the over-order premiums as before, as a practical matter, premiums are declining and the out-of-state farmers are forced to finance the assessment. See Affidavit of Leon J. Berthiaume.

The pricing order benefits the Massachusetts farmer through the combined effects of direct subsidy and handicapped competition. Massachusetts farmers are (1) guaranteed a higher minimum price for their Class I milk and (2) insulated from lower-priced out-of-state competitors whose prices are required to mirror their own. Conversely, the cost to the dealer of the out-of-state farmer's milk has been driven up, but the farmer is not permitted to reap the benefit of the increase, is not free to lower the price of his milk to gain in market share what was lost in revenues, and is no longer in a position to negotiate decent over-order premiums because the purchasing power of the dealers has been reduced.

B. THE COMMERCE CLAUSE FORBIDS THE ECONOMIC PROTECTIONISM INHERENT IN THE PRICING ORDER

The Commerce Clause of the United States Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States. . . . " Art. I, § 8, cl. 3. "It is long established that, while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the States to discriminate against interstate commerce." *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992). "This 'negative' aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988).

The Supreme Court has developed a two-tiered analysis to examine state regulatory attempts to determine whether the Commerce Clause has been violated.

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute had only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's burden on interstate commerce clearly exceeds the local benefits. We have also recognized there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the . . . balancing approach.

> In either situation the critical consideration is the overall effect of the statute on both local and interstate activity. (citations omitted)

Brown-Foreman Distillers v. New York Liquor Authority, 476 U.S. 573, 579 (1985).

There are aspects of the Commissioner's pricing order that meet all these tests, which affirms the Court's observation above that there is often no bright line distinction between direct and indirect effects on interstate commerce. The order directly regulates the cost of milk in states other than Massachusetts; it favors in-state interests over out-of-state interests with monthly subsidy payments; and it has a more subtle impact on interstate commerce because it blocks competitive pricing from out-of-state farmers while reducing the income they receive from over-order premiums. The modest benefit to the Massachusetts farmer from a monthly bonus payment does not cure the ailing dairy industry, does not safeguard a milk supply and certainly does not justify making it even harder than it already is for the beleaguered out-of-state farmer with a Massachusetts market to make a living from a dairy farm.

a. The pricing order directly affects interstate commerce and discriminates against out-of-state milk producers.

The lower court found the pricing order affected interstate commerce and burdened out-of-state producers, *West Lynn Creamery, Inc. v. Commissioner of the Dept. of Food & Agriculture*, 611 N.E.2d 239, 244, 245 (Mass. 1993), but concluded both effect and burden were

incidental. The court's analysis centered on the pricing order's impact on the milk dealer and its use of a state fund rather than price control measures, and ignored both the farmer and the nature of the milk market. "We hold that the pricing order does not discriminate on its face, is evenhanded in its application, and only incidentally burdens interstate commerce. Our conclusion flows from the manner in which milk dealers are called on to contribute to the Fund." *Id.* at p. 243. This narrow focus on milk dealers obscured the central Commerce Clause issues in this case, and skewed the court's application of the above Commerce Clause analysis.

There is no question that the pricing order directly affects interstate commerce; the parties and the lower court agree that the assessment is imposed on all fluid milk sold in Massachusetts, including milk produced elsewhere and brought into Massachusetts for retail sale and consumption. Roughly two thirds of the milk sold in Massachusetts is produced out-of-state.

The order is likewise undeniably discriminatory on its face because the assessment money, which is collected on out-of-state as well as in-state milk, is paid only to in-state producers. Yet, the court reached three conclusions that led it to decide the pricing order is evenhanded: (1) in-state milk dealers are not favored over their out-of-state competitors; (2) the pricing order does not manifest any preference for in-state milk over out-of-State milk, and (3) the pricing order does not promote the sale of Massachusetts milk to the detriment of out-of-State producers. *Id.* at pp. 243-244.

Even if these conclusions are correct, however, they are not dispositive of the Commerce Clause issues in this case. The equal treatment of dealers does not excuse the disparate treatment of in-state versus out-of-state producers. Furthermore, the order does not need to manifest a preference for in-state milk or promote its sale to the detriment of out-of-state competitors on its face; it operates equally effectively by limiting the competitiveness and profitability of the out-of-state farmers, which preserves the market for in-state milk.

The distinction between direct and indirect effects on interstate commerce is not the same as the distinction between effects that are readily apparent from the face of the law and those that are not. In other words, a law may directly affect interstate commerce in ways that are not obvious from the face of the law. This is not a Commerce Clause case in which one state acts to exclude another state's products to create a greater market share for its own producers; if Massachusetts had a large enough dairy industry to expand to meet her citizens' milk needs, this pricing order would never have issued. Massachusetts is dependent on out-of-state milk, and seeks to capitalize on this influx to finance her farmers while protecting their share of the milk market. With its combination of price stabilization and competition suppression, the pricing order under review is a variant of the economic protectionism attempted and struck down in *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 512 (1934).

In *Baldwin*, this court examined and rejected New York's effort to regulate the prices of out-of-state milk and suppress competition under the guise of insuring a fresh supply of wholesome milk. New York enacted a law that established a minimum price dealers were required to pay for milk produced by New York farmers to boost

the latter's income. If the regulation had stopped there, it would not have run afoul of the Commerce Clause, but it would have left the in-state farmers vulnerable to out-of-state competitors who would have cut their prices to undersell the New York prices. The regulations therefore required that all milk sold in New York had to be bought from farmers at the minimum New York price, regardless of where the farmer was located.

The Court held that New York's attempt to set the price paid for out-of-state milk sold in New York was economic regulation with an anti-competitive objective, and as such, burdened interstate commerce in violation of the Commerce Clause. "Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states." *Baldwin*, 294 U.S. at p.522.

It is likewise the avowed purpose and the necessary tendency of the instant pricing order to increase the income that Massachusetts milk producers earn on their milk while suppressing competition from out-of-state farmers to protect the market share held by Massachusetts farmers. If the assessment were only imposed on in-state milk, it would be cheaper for dealers to buy out-of-state milk to avoid paying the assessment. This "even-handed" application of the assessment to all milk regardless of origin is designed not to promote equality but to neutralize market forces and foreclose any competitive action out-of-state farmers would take to compensate for the fact that they are excluded from sharing in the subsidy funds. The pricing order ensures that the out-of-state

farmer is paid less for his milk in Massachusetts than his Massachusetts counterpart who receives the monthly kickback. The fact that the pricing order uses the mechanism of the Equalization Fund, rather than direct price setting, to establish milk prices paid to in-state and out-of-state farmers does not alter the discriminatory and anti-competitive purpose and effect of the order.

b. The pricing order indirectly affects interstate commerce by driving up the wholesale cost of milk.

The lower court found the unconstitutional aspect of the law invalidated in *Baldwin* was its establishment of a minimum price for milk, regardless of its point of origin. *West Lynn Creamery, Inc.*, 611 N.E. 2d at p.243. The Massachusetts Supreme Judicial Court reasoned that the instant case is distinguishable because the milk dealer's assessment is independent of the price paid to the farmer. This analysis, however, is grounded on the premise that the *cost* of milk to a milk dealer is distinct and unrelated to the *price* he is willing to pay the farmer for the raw milk. This ignores the realities of price setting in any market, not just the milk market.

The dealer is already required to pay the federal minimum price to the farmer for every CWT purchased. The pricing order imposes an additional amount the dealer owes on every CWT sold. Even though that additional amount is paid into a fund rather than directly to the producer, it is a cost of doing business like the purchase price. Indeed, the lower court explicitly recognized this: "[T]he premiums [assessments] represent one of the

costs of doing business in the Commonwealth, a cost all milk dealers must pay." *Id.* at p.245.

When the dealer's costs are increased, the price paid to the farmer is decreased. Consumer milk prices have remained flat for years due to intense competition at the retail level and will not absorb the increase. Therefore, because of the dual barriers imposed by the federal minimum threshold and the retail prices, the only area of pricing flexibility is the over-order premium, and that is where the reductions are felt.

c. The burden on interstate commerce is not justified by the local benefits.

Since the Commerce Clause prohibits a state from impeding interstate commerce solely to protect economic interests, a "health and welfare" motivation that is a legitimate interest to be pursued under a state's police power is invariably raised as the key motivation for the law under attack. In milk cases, this justification often takes the form of insuring a fresh supply of wholesome milk. *Nebbia v. New York,* 291 U.S. 502 (1934); *Polar Ice Cream and Creamery Co. v. Andrews,* 375 U.S. 361 (1964); *Farmland Dairies v. McGuire,* 789 F.Supp. 1243 (S.D.N.Y. 1992).

As in the present case, New York justified its law in *Baldwin* by claiming "[t]he end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income." *Baldwin,* 294 U.S. at 523. The Court rejected this

rationale as a contrivance to circumvent the principles of federalism that underlie the Commerce Clause.

> To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

Baldwin, 294 U.S. at 523.

The pricing order at issue is likewise premised on the Respondent's need to maintain a local milk supply. The Commissioner states "Massachusetts producers are facing an emergency situation due to these federally set prices . . . . Through stabilizing the price producers are paid for their product, consumers will be assured of a local supply of fresh milk." Amended Pricing Order, I. Preamble.

The Respondent's stated interest in guaranteeing a "local supply of fresh milk" is not advanced by the pricing order. A local supply of milk has not been eliminated by the federal prices nor will it be restored or guaranteed by the "price stabilization" envisioned by the pricing order. Even the Supreme Judicial Court of Massachusetts recognizes this: "[W]e cannot say that fund distributions were intended, or would be sufficient, to expand and develop the Massachusetts dairy industry such that the Commonwealth would be less dependent on "foreign" milk producers." *West Lynn Creamery, Inc.,* 611 N.E. 2d at p.244.

Massachusetts' milk supply exists out of state; it has relied on other states' milk to meet its milk needs for

decades, if not longer. As far back as 1948, Boston obtained 90% of its fluid milk from states other than Massachusetts. *Hood and Sons, Inc. v. DuMond,* 336 U.S. 525, 526 (1948).

Vermont is one of those "foreign milk producers" on which Massachusetts relies for milk. It is a dairy export state; sparsely populated, rural in character, and, because it produces more milk than it consumes, economically dependent on out-of-state markets. Vermont farmers sell only 5% of their production in Vermont as Class I fluid milk; 45% is sent out of the state and the remaining 50% is manufactured or processed in-state into less-profitable Class II-III-A products, which in turn are largely shipped out of the state as well. Massachusetts is a large and important milk market to Vermont. Vermont farmers have the capacity and the means to supply more Class I milk to the Commonwealth. Yet, by making it unprofitable for out-of-state farmers to sell fluid milk in Massachusetts, the pricing order could decrease, rather than insure, a supply of wholesome milk to its citizens. Moreover, since the pricing order limits the competitiveness and reduces the premiums and therefore the income of out-of-state producers, it injures already struggling farmers in export states like Vermont and may further reduce the milk supply outside of Massachusetts by putting more farmers out of business.

The stated purpose of the pricing order is to address the "state of emergency" facing the Massachusetts dairy industry, which the Respondent attributes to the federal pricing system and the instability of prices Massachusetts producers are paid for their milk. Yet, the crisis confronting the dairy industry in Massachusetts, Vermont and the nation is not the federal pricing system and the instability of the prices dealers pay farmers for their milk but the dual pressures of creeping urbanization and the increased efficiency of milk production techniques which create too much milk, depressing its price and making it more profitable to sell the family farm to a developer. The number of dairy farms and dairy farmers who can make a profitable living off the farm are becoming fewer and fewer, and unfortunately, it is an irreversible process; once dairy farms are transformed into subdivisions, there is no turning back. As disturbing as this trend is, it is not a sudden crisis nor is it unique to Massachusetts. In the last 30 years, Vermont has lost 68.2% of her dairy farms.

Vermont has the same sovereign interest as Massachusetts, and indeed any other state, in maintaining the economic viability of its dairy farmers. Vermont is an export state surrounded by other export states like Maine and New Hampshire, and therefore her farmers are especially dependent on the local import market Massachusetts provides and are especially vulnerable to the Commissioner's unfair pricing practices.

Although it would appear that the import/export relationship of the two states gives each state roughly equal bargaining power, the nature of milk tips the scales in favor of Massachusetts. Milk is perishable and cannot be conveniently stored; as fresh fluid milk, it must be shipped quickly to nearby markets. Nor can production be temporarily stopped until alternate markets are found; to be kept healthy, cows have to be milked frequently and regularly. Therefore, excess milk must be "dumped" if there is no market. Of course, the shelf life of milk can be extended by making it into powder or other processed

milk products, but the farmer is not paid as much as he or she is for Class I fluid milk which yields the aforementioned "over order" premiums.

The Commerce Clause prevents Massachusetts from capitalizing on the market dependence of its neighbors solely to bolster its own economy, and ensures that "our economic unit is the Nation," *Hood*, 336 U.S. at 537, rather than the separate states. In contradistinction to the aim and purpose of the Commerce Clause, the pricing order unfairly uses the regional nature of the milk market to generate funds for its farmers while it limits the competitiveness and the premiums of the "captive" out-of-state producers who would be hardpressed to find alternate markets for fresh milk.

The *Baldwin* court observed in the 1930's that "the milk market does not observe state lines," *Baldwin*, 294 U.S. at 512, and the Commissioner re-confirmed the present day truth in that statement in the preamble to the pricing order when he stated "[t]he terms and conditions of the Order take into consideration the regional nature of the flow of milk . . . " Yet the order is a distinctly parochial effort designed to undermine this interdependence of states to boost the Massachusetts farmer's income in the short-term at the expense of the farmers in neighboring states that are tied to Massachusetts through the federal milk pricing system. The pricing order can not salvage the Massachusetts dairy industry, and does not provide a supply of fluid milk to the state's residents. Therefore, the burden the pricing order imposes on interstate commerce and its harsh anti-competitive effects on out-of-state farmers are not outweighed by local benefits,

which exist only as a wish list and not as a tangible solution to the dwindling dairy industry.

V. CONCLUSION

By insulating Massachusetts milk producers from competition and simultaneously paying them a subsidy based largely on out-of-state production, the pricing order damages and fragments the nation's dairy industry and does not address its problems. Favoring one state's producers at the expense of those in surrounding states weakens the fragile economics of Vermont's and New England's already beleaguered dairy farmers, it pits Massachusetts farmers against out-of-state farmers who resent the protectionist measures and recognize that the money being funnelled into the Massachusetts farmers' pockets comes from their efforts, and it undermines reams of federal precedent that forbids a state to protect its local economic interests by obstructing competition and "isolating the State from the national economy." *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978).

WHEREFORE, the State of Vermont respectfully requests that this Court find that the pricing order violates the Commerce Clause of the U.S. Constitution.

Dated: November 11, 1993

Respectfully submitted,

State of Vermont
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Ct. Id. # bma 09955

APPENDIX

AFFIDVAIT

1. My name is Leon J. Berthiaume. I am the General Manager of St. Albans Cooperative Creamery, Inc. ("St. Albans"). I have held that position since the end of 1991. I previously served as the Assistant Controller of St. Albans from 1984-1986 and the Controller from 1986-1991. I received a B.S. degree in Accounting from the University of Vermont, and am a registered Certified Public Accountant in Vermont.

2. St. Albans is an agricultural cooperative incorporated in the State of Vermont with its principal place of business in St. Albans, Vermont. All of its approximately 573 dairy farmer members are located in the State of Vermont. St. Albans markets its members' raw milk to fluid processing plants located in Massachusetts, New Hampshire, New York and Vermont, and manufacturing plants located in Vermont. St. Albans Cooperative Creamery also owns a processing facility located in St. Albans, where it produces cream, skimmed milk, skimmed condensed milk, and nonfat dry milk powder.

3. The Pricing Order effectively sets a minimum price for milk purchased from out-of-state farmers like St. Albans and sold after processing in Massachusetts. This minimum price is equal to the federal Class I minimum price plus one-third of the difference between the federal blend price and $15.

4. The Pricing Order caused the market premium paid to St. Albans to decrease substantially. Just prior to the time that the Pricing Order came into effect, St. Albans was receiving a market premium of about 40 cents

per hundredweight. Because the Pricing Order raised the price paid to Massachusetts farmers, a processor buying significant quantities of milk from Massachusetts farmers, Garelick, was able to lower the market premiums that it paid voluntarily to Massachusetts farmers. Other Class I processors selling in Massachusetts buy more of their milk from out-of-state farmers, and they were forced to lower the market premium they paid to out-of-state farmers, including St. Albans, in order to maintain raw product costs comparable to Garelick, who buys more milk from Massachusetts farmers. Such processors included The Stop & Shop Company, Inc., a Massachusetts Class I dealer to whom St. Albans then supplied raw milk, as it still does today. The Market premium paid to St. Albans decreased to 20 cents per hundredweight.

5. If the Pricing Order only regulated the price of milk produced by Massachusetts farmers, St. Albans would be able to sell milk to additional Class I dealers to whom it is not currently selling milk, This would result from St. Albans' ability and willingness to sell milk at a price below that established by the Massachusetts Pricing Order.

/s/ Leon J. Berthiaume
Leon J. Berthiaume

Subscribed and sworn to before me
this 12th day of November, 1993

/s/ Doreen W. LaFlam
Notary Public
My Term Expires: 2/10/95

[SEAL]